IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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| STATE OF WASHINGTON, | ) | NO. 54483-7-I |
| | ) | |
| Respondent, | ) | |
| v. | ) | UNPUBLISHED OPINION |
| | ) | |
| GORDON O. SMISSAERT, | ) | |
| | ) | |
| Appellant. | ) | FILED: SEPTEMBER 25, 2006 |

PER CURIAM – After a trial to a jury, Gordon Smissaert was convicted of raping his five year old neighbor but acquitted of raping his six year old son. Throughout the proceedings, Smissaert sought to sever these two charges. He contends the trial court's refusal to do so requires a new trial. We affirm because Smissaert has failed to show that the trial court abused its discretion and because he has not shown prejudice arising from the denial of his severance motions.

FACTS

In late August 2003, Tayze Black went with her next door neighbor Rose Smissaert to a movie. Black left her five year old daughter MB with Smissaert (Rose's husband) and the Smissaerts' six year old son SS. A few days later, MB disclosed to Black that Smissaert had put his finger into her vagina while Black and Rose had been at the movie. After Black reported the allegation to police one week later, MB repeated these allegations to a child interviewer. MB also alleged at the interview that SS had tried to put his finger into her vagina, but she would not let him.

Police arrested Smissaert soon after the interview. Smissaert originally denied ever touching MB inappropriately. At a later interview, Smissaert explained that he and MB and SS would often wrestle. He admitted that he had smoked marijuana on the day he was alleged to have raped MB, and that marijuana impairs his judgment. He said that if he had touched MB in her private area while wrestling with her it was a "momentary lapse in judgment."[1] He then explained that one time he might have accidentally "touched her there" while trying to get her off of his hand.[2] He said he could not explain why "it happened", but that he had never improperly touched her on purpose.[3]

[1] Report of Proceedings (5/17/2004) at 149.
[2] Report of Proceedings (5/17/2004) at 149.
[3] Report of Proceedings (5/17/2004) at 150.

In the months following Smissaert's arrest, SS began to have behavioral problems and bad dreams. Rose placed SS in counseling, and he was prescribed several medications. In early January 2004, SS nervously told Rose: "I'm sorry, mom, he did it to me too."[4] He described Smissaert putting his finger into SS's anus. SS also told Rose that Smissaert had said he would kill Rose if SS told Rose about the abuse.[5] SS told the same child interviewer that had interviewed MB that Smissaert had put his finger into his anus four times. The same doctor examined both children, but was unable to find any physical sign of sexual abuse.

The State charged Smissaert with one count each of first degree child rape for MB and SS. The charges were joined, and Smissaert moved to sever them at a pretrial hearing. The court denied the motion.

The trial took three court days. At trial, both mothers testified, as did both children. The children largely repeated their allegations. However MB denied ever telling the interviewer that SS had tried to molest her. SS testified he did not see Smissaert improperly touch MB. SS alleged that Smissaert had put his finger into SS's anus eight times, rather than four times, and his testimony was inconsistent as to when these incidents occurred. The doctor testified that she would not generally expect the types of abuse alleged by the children to leave

[4] Report of Proceedings (5/13/2004) at 66.
[5] Report of Proceedings (5/13/2004) at 68.

any physical evidence. The detective who investigated both cases and two other law enforcement officers testified to Smissaert's statements concerning the incidents. The child interviewer testified concerning both interviews.

The court played a video recording of each interview for the jury. After the recordings were played, the court read the jury a limiting instruction at Smissaert's request. The instruction required the jury to consider each count separately:

> Evidence has been introduced relating to [MB] on Count I and other evidence has been introduced relating to [SS] on Count II. Each count is to be determined separately based only on the evidence pertaining to that particular count. You must not consider the evidence relating to Count I in your decision on Count II, and you must not consider the evidence relating to Count II in your decision on Count I.[6]

At the close of the State's case, Smissaert again moved to sever the charges. The court denied the motion. Smissaert did not testify or call any witnesses to testify. Before closing arguments, the court again instructed the jury to consider each count separately:

> A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.[7]

Defense counsel argued in closing that although the charges were separate, there were several "bridges"[8] between the two cases that the jury

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[6] Report of Proceedings (5/17/2004) at 50.
[7] Clerk's Papers at 106.
[8] Report of Proceedings (5/18/2004) at 103.

could consider. For instance, he told the jury they could consider the fact that the only possible independent witness of Smissaert's rape of MB would have been SS, and that SS had denied seeing Smissaert rape MB. The second purported bridge was that SS did not disclose his abuse until after he had been told of MB's rape allegation and after he had begun taking mind-altering prescription drugs. The third purported bridge was MB's original allegation against SS. Defense argued MB's allegations against Smissaert lacked credibility because she had testified inconsistently with her prior statement about whether SS had also molested her. Therefore, he argued, her allegation against Smissaert was not credible.

The jury convicted Smissaert of raping MB but acquitted him of raping SS. The trial court imposed an indeterminate sentence of 108 months to life in prison. Smissaert appeals.

Smissaert's opening brief challenged the admission of several hearsay statements under the child hearsay statute, RCW 9A.44.120. He argued the statute unconstitutionally denied him the right to confront his accusers. After Smissaert submitted his opening brief, the Washington Supreme Court issued its decision in State v. Shafer, 156 Wn.2d 381, 128 P.3d 87 (2006). By letter to this court, Smissaert stipulated that "the Shafer case is dispositive on the constitutionality of RCW 9A.44.120." Accordingly, we do not address the confrontation claims raised in Smissaert's opening brief.

Smissaert's only remaining contention is that the trial court abused its discretion by denying his motions to sever the charges.

CrR 4.3(a) permits two or more offenses of similar character to be joined in one trial. Properly joined offenses may be severed if "the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense." CrR 4.4(b). Defendants seeking severance must demonstrate that a trial involving both counts would be so manifestly prejudicial as to outweigh the concern for judicial economy. Bythrow, 114 Wn.2d 713, 718, 790 P.2d 154 (1990).

Because the jury acquitted Smissaert of raping his son, we examine the potential prejudice only as it relates to his ability to receive a fair trial on the charge that he raped MB. In determining whether the potential for prejudice requires severance, a trial court must make a four-pronged prejudice mitigation analysis. That is, the court must consider the strength of the State's evidence on each count, the clarity of defenses as to each count, court instructions to the jury to consider each count separately, and the admissibility of evidence of the other charges even if not joined for trial. We review the denial of severance motions for manifest abuse of discretion. State v. Russell, 125 Wn.2d 24, 62-63, 882 P.2d 747 (1994).

The trial court analyzed each of these four factors in denying Smissaert's pretrial severance motion. The court concluded the evidence for each count was

"fairly strong".[9] The court next concluded that the defense in each case was general denial, which would not confuse the jury. Defense counsel argued that he believed the State would attempt to saddle Smissaert with an accident defense, based on his statements to police. The court noted that this would not change Smissaert's actual defense of general denial. The court asserted that it could "without question, provide jury instructions that would clearly inform the jury that they are to consider these crimes separately."[10] Finally, with respect to cross-admissibility, the court concluded that evaluation of that factor would have to wait until it made further evidentiary rulings. However, the court noted that if the State was successful in having Smissaert's accident-related statements admitted into evidence, then much of the evidence would be cross-admissible because the allegations that Smissaert raped SS would tend to show his touching of MB was not an accident. However, the court was well aware of the possibility that much of the evidence might not be cross-admissible.

After weighing these prejudice-mitigating factors, the court analyzed the benefit of joint trials to judicial economy. The court concluded that most of the witnesses would be called to testify at each trial. The court therefore concluded that the prejudice to Smissaert of joint trials did not outweigh the benefit to judicial economy, and denied the severance motion.

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[9] Report of Proceedings (4/13/2004) at 45.
[10] Report of Proceedings (4/13/2004) at 47.

This conscientious evaluation of the relevant factors and subsequent ruling was not an abuse of discretion. Smissaert contends the court abused its discretion because it incorrectly evaluated cross-admissibility. He contends the court incorrectly accepted the State's representation that the two counts constituted a common scheme or plan for ER 404(b) purposes. But the trial court expressly reserved ER 404(b) rulings, and came to the conclusion that severance should be denied even if much of the evidence was not cross-admissible.

Smissaert next contends the trial court later made an ER 404(b) ruling that "declared as a matter of law there was no cross-admissibility."[11] He explains that any reasonable trial court making such a ruling also should have felt compelled to grant his end-of-trial severance motion.

But no such ruling occurred. The "ruling" Smissaert refers to is the court's limiting instruction, to the effect that the jury should evaluate each count based solely on the evidence relating to that count. Smissaert has pointed to no portion of the record at which the court told the jury which evidence related to which count. Neither party asked the trial court to do so. In fact, defense counsel argued without objection that the jury could consider some evidence cross-admissible, referring to three "bridges" between the two cases.

Smissaert similarly contends that each of the other prejudice-mitigating

[11] Brief of Appellant at 49.

factors supported severance. He contends the evidence on the count relating to MB was minimal, and the evidence on the count relating to SS was powerful. The jury's verdict--convicting on the count relating to MB and acquitting on the count relating to SS--belies this argument. Smissaert's argument that the jury may have voted to acquit on the count relating to SS based on its reluctance to forever stigmatize him an incest victim is pure speculation. Smissaert next contends that the State added confusion to the defenses by gaining admission of his statements that suggested he may have accidentally touched MB. But this statement did not change Smissaert's defense of general denial. Defense counsel argued in closing both that Smissaert had not touched either child improperly, and that even if there had been touching, there had not been penetration. Neither is an accident defense. Smissaert finally contends that no jury could have put the evidence on the count relating to SS out of its mind when deciding the count relating to MB. Again, the jury's verdict belies this argument. The trial court did not abuse its discretion in denying severance.

Moreover, even if Smissaert had pointed us to some flaw in the trial court's cross-admissibility analysis, our inquiry would not end there. A misapplication of ER 404(b) in the severance context does not require a new trial where, within reasonable probabilities, the outcome of the trial would have been the same. State v. Watkins, 53 Wn. App. 264, 268, 766 P.2d 484 (1989). The jury persuasively demonstrated that it could put aside propensity inferences

by acquitting Smissaert of raping SS.

Smissaert argues to the contrary, citing State v. Ramirez, 46 Wn. App. 223, 227, 730 P.2d 98 (1986). There, Division II of this court held that despite an acquittal on one count of indecent liberties, the jury may have used the evidence presented to prove that count to infer a criminal disposition on the part of the defendant in deciding a second and unrelated count of indecent liberties. Therefore, the trial court's denial of Ramirez's severance motion could not have been harmless. Ramirez, 46 Wn. App. at 228. Division I has twice rejected this Ramirez analysis. See State v. Standifer, 48 Wn. App. 121, 127, n.2, 737 P.2d 1308 (1987)("we decline to follow the analysis implicit in State v. Ramirez"); Watkins, 53 Wn. App. at 272 ("Without explanation or analysis, the court in Ramirez … required a new trial in circumstances where there were no events actually prejudicing the defendant."). There was no reasonable probability that the jury would have acquitted on the MB count had the trial court granted the motion to sever; any error was harmless.

STATEMENT OF ADDITIONAL GROUNDS

Pro se, Smissaert contends the court erred at sentencing by failing to consider releasing him on bail pending the outcome of his appeal. But the record does not show any place in which Smissaert asked the court to release him pending his appeal. He has not preserved this claim for appeal.

Affirmed.

FOR THE COURT

Becker, J.

Dwyer, J.

Appelwick, C.J.